

(2)
No. 92-1223

Supreme Court, U.S.

FILED

MAR 5 1993

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BAT-
TALION CENTER, GULFPORT, MISSISSIPPI, AND THE U.S.
DEPARTMENT OF DEFENSE, ARMY and AIR FORCE EX-
CHANGE, DALLAS, TEXAS, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

DAVID M. SMITH *
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

WILLIAM E. PERSINA
Attorney

PAMELA P. JOHNSON
Attorney
Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

* Counsel of Record

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT	2
A. Background—The Federal Service Labor-Man- agement Relations Statute	2
B. Proceedings in the Present Case	4
1. The Authority's Decisions	4
2. The Court of Appeal's Decision in the In- stant Case	6
THE AUTHORITY DOES NOT OPPOSE THE PETI- TION	11

TABLE OF AUTHORITIES

Cases:

<i>American Fed'n of Gov't Employees, Local 1760 v. FLRA</i> , 786 F.2d 554 (2d Cir. 1986)	7, 8
<i>Bureau of Alcohol, Tobacco and Firearms v. FLRA</i> , 464 U.S. 89 (1983)	3, 12
<i>Department of Justice v. Reporters Committee for Freedom of the Press</i> , 489 U.S. 749 (1989)	passim
<i>Farmers Home Administration Finance Office, St. Louis, Missouri</i> , 23 F.L.R.A. 788 (1986), en- forced in part and remanded sub nom. <i>United States Department of Agriculture v. FLRA</i> , 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989)	5
<i>Federal/Postal/Retiree Coalition v. Devine</i> , 751 F.2d 1424 (D.C. Cir. 1985)	3
<i>FLRA v. Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l Ocean Serv.</i> , 954 F.2d 994 (4th Cir. 1992), vacated and reh'g granted (Apr. 22, 1992)	8, 9
<i>FLRA v. Department of the Navy, Naval Resale Activity</i> , 963 F.2d 124 (6th Cir. 1992)	9
<i>FLRA v. Department of the Navy, Navy Exch., Naval Training Station, Naval Hosp., Great Lakes, Ill.</i> , 975 F.2d 348 (7th Cir. 1992)	9

II

Cases—Continued:

Page

<i>FLRA v. Department of the Navy, Navy Resale & Serv. Support Office, Field Support Office, Auburn, Wash.</i> , 958 F.2d 1490 (9th Cir. 1992) (petition for rehearing and suggestion for rehearing en banc pending)	8
<i>FLRA v. Department of the Navy, Navy Ships Parts Control Ctr.</i> , 966 F.2d 747 (3d Cir. 1992) (en banc)	8, 11, 12
<i>FLRA v. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.</i> , 941 F.2d 49 (1st Cir. 1991)	9
<i>FLRA v. Department of the Treasury, Fin. Management Serv.</i> , 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 493 U.S. 1055 (1990)	6, 9
<i>FLRA v. Department of Veterans Affairs Medical Ctr., Newington, Conn.</i> , 958 F.2d 503 (2d Cir. 1992)	9
<i>FLRA v. U.S. Dep't of Defense</i> , 977 F.2d 545 (11th Cir. 1992)	9
<i>FLRA v. United States Dep't of Defense, Army and Air Force Exch. Serv., Dallas, Tex.</i> , Nos. 90-9561 & 90-9569 (10th Cir. Jan. 20, 1993)	9
<i>Fort Stewart Schs. v. FLRA</i> , 495 U.S. 641 (1990) ..	3
<i>National Treasury Employees Union v. FLRA</i> , 810 F.2d 295 (D.C. Cir. 1987)	12
<i>U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire</i> , 37 F.L.R.A. 515 (1990), rev'd sub nom. <i>Department of the Navy, Portsmouth Naval Shipyard, New Hampshire v. FLRA</i> , 941 F.2d 49 (1st Cir. 1991)	5, 6
<i>United States Dep't of Agric. v. FLRA</i> , 836 F.2d 1139 (8th Cir. 1988), vacated on other grounds and remanded, 488 U.S. 1025 (1989)	7
<i>United States Dep't of Health and Human Servs. v. FLRA</i> , 833 F.2d 1129 (4th Cir. 1987), petition for cert. dismissed, 488 U.S. 880 (1988)	7, 8, 12
<i>United States Dep't of the Air Force v. FLRA</i> , 838 F.2d 229 (7th Cir.), petition for cert. dismissed, 488 U.S. 880 (1988)	7

III

Cases—Continued:

Page

<i>United States Dep't of the Navy and Philadelphia Naval Shipyard v. FLRA</i> , 840 F.2d 1131 (3d Cir.), petition for cert. dismissed, 488 U.S. 881 (1988)	7, 8
---	------

Statutes and regulation:

Federal Service Labor-Management Relations Statute (Statute) 5 U.S.C. 7101-7135 (1988)	2
5 U.S.C. 7101 (a)	3, 6
5 U.S.C. 7102	3
5 U.S.C. 7103 (a) (12)	3
5 U.S.C. 7104	3
5 U.S.C. 7105	3
5 U.S.C. 7111 (a)	3
5 U.S.C. 7114 (a) (1)	3
5 U.S.C. 7114 (a) (4)	3
5 U.S.C. 7114 (b) (4)	passim
5 U.S.C. 7116 (a) (1)	4
5 U.S.C. 7116 (a) (5)	4
5 U.S.C. 7116 (a) (8)	4
5 U.S.C. 7117	3
National Labor Relations Act, 29 U.S.C. 151-169 (1988)	12
The Freedom of Information Act, 5 U.S.C. 552 (1988)	passim
5 U.S.C. 552 (b) (6)	6, 7, 10
5 U.S.C. 552 (b) (7) (C)	8, 9, 10
The Privacy Act, 5 U.S.C. 552a (1988)	5, 7, 8
5 U.S.C. 552a (a) (7)	11
5 U.S.C. 552a (b) (2)	5
5 U.S.C. 552a (b) (3)	11
5 U.S.C. 552a (e) (4) (D)	11
49 Fed. Reg. 36,949 (1984)	11
49 Fed. Reg. 36,956 (1984)	11

Miscellaneous:

Federal Personnel Manual Letter 711-164	11
---	----

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1223

U.S. DEPARTMENT OF DEFENSE, U.S. DEPARTMENT OF
NAVY, NAVY CBC EXCHANGE, CONSTRUCTION BAT-
TALION CENTER, GULFPORT, MISSISSIPPI, AND THE U.S.
DEPARTMENT OF DEFENSE, ARMY and AIR FORCE EX-
CHANGE, DALLAS, TEXAS, PETITIONERS

v.

FEDERAL LABOR RELATIONS AUTHORITY AND AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE
FEDERAL LABOR RELATIONS AUTHORITY**

INTRODUCTION

On January 21, 1993, U.S. Department of Defense, U.S. Department of Navy, Navy CBC Exchange, Construction Battalion Center, Gulfport, Mississippi ("Navy Exchange"), and the U.S. Department of Defense, Army and Air Force Exchange, Dallas, Texas ("AAFES" or "Lowry AF Base") (jointly referred to as "the agencies"), petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

The opinion of the court of appeals is reported at 975 F.2d 1105, and is appended to the petition (Pet. App. 1a-34a). The court's denial of the agencies' petition for rehearing and suggestion of rehearing *en banc* is also appended to the petition (Pet. App. 35a-36a).

It is the position of the respondent Federal Labor Relations Authority (Authority) that the Fifth Circuit decision is correct and should be affirmed. However, a division among the circuits exists over the resolution of a major issue in this case concerning the entitlement of exclusive bargaining representatives of federal employees, under 5 U.S.C. 7114(b)(4), to the names and home addresses of employees in the bargaining units represented by the unions. This division causes uncertainty for all participants in federal government labor-management relations. Moreover, resolution of the issue is of considerable importance because it also impacts on the other types of personal information, aside from unit employees' home addresses, that unions will be entitled to in carrying out their representational roles under the Federal Service Labor-Management Relations Statute (Labor Statute), as amended, 5 U.S.C. 7101-7135 (1988). Accordingly, the Authority does not oppose granting the present petition.

STATEMENT

A. Background—The Federal Service Labor-Management Relations Statute

Labor-management relations in the federal service are governed by the Labor Statute. Under the Labor Statute, the responsibilities of the Federal Labor Relations Authority, a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating

to matters arising under the Labor Statute. 5 U.S.C. 7104-7105.¹

Congress specified in the Labor Statute that "labor organizations and collective bargaining are in the public interest." 5 U.S.C. 7101(a). Consistent with this finding of Congress, the Labor Statute requires an agency to accord exclusive recognition to a labor organization selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election. 5 U.S.C. 7111(a). A labor organization accorded such exclusive recognition has an obligation to represent fairly "all employees in the unit" regardless of whether they are union members. 5 U.S.C. 7114(a)(1). Employees in a unit of exclusive recognition have the right to refrain from joining a labor organization as a dues-paying member. 5 U.S.C. 7102. The agency and the labor organization have a duty to meet and negotiate in good faith for the purpose of arriving at a collective bargaining agreement. 5 U.S.C. 7114(a)(4). The duty to bargain in good faith extends to matters relating to conditions of employment affecting bargaining unit employees. 5 U.S.C. 7103(a)(12) and 7117; *see also Fort Stewart Schs. v. FLRA*, 495 U.S. 641, 644 (1990).

Congress enacted section 7114(b)(4) of the Labor Statute to facilitate union representation and enable unions to meet their representational duties. That section requires a federal employer to furnish the exclusive bargaining representative "to the extent not prohibited by

¹ The Authority performs a role analogous to that of the National Labor Relations Board (NLRB) in the private sector. *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92-93 (1983) (BATF); *Federal/Postal/Retiree Coalition v. Devine*, 751 F.2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *BATF*, 464 U.S. at 97.

law" with any requested data that is, among other things, "reasonably available"; "normally maintained by the agency in the regular course of business"; and "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." 5 U.S.C. 7114(b)(4).

The Labor Statute also makes it an unfair labor practice for a federal agency employer to, among other things, "interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Labor Statute]"; "refuse to consult or negotiate in good faith with any labor organization"; or "otherwise fail or refuse to comply with any provision" of the Labor Statute. 5 U.S.C. 7116(a)(1), (5), and (8).

B. Proceedings in the Present Case

1. The Authority's Decisions

These cases concern two Authority unfair labor practice decisions and orders. The cases arose from requests by unit employees' exclusive representatives of the agencies under 5 U.S.C. 7114(b)(4) for the employees' names and home addresses (Pet. App. 2a-3a). The facts in both cases are virtually identical. The first case (No. 90-4722 before the Fifth Circuit) involved an information request made by the United Food and Commercial Workers Union, Local 1657, which represents a bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of the Navy Exchange in Gulfport, Mississippi (Pet. App. 2a). The second case (No. 90-4775 before the Fifth Circuit) involved a request made by the American Federation of Government Employees, Local 1345, the union representing a consolidated, worldwide bargaining unit composed of all regular full-time and part-time employees, and all intermittent employees of AAFES which is headquartered in Dallas, Texas and operates a facility at Lowry AF Base in Colo-

rado (Pet. App. 3a). The Navy Exchange and AAFES, Lowry AF Base denied the unions' requests and the unions filed unfair labor practice charges with the Authority. The Authority ordered the disclosure of unit employee names and home addresses (Pet. App. 37a-51a, 52a-64a).

The Authority based its rulings in both decisions and orders on the Authority's prior decision in *U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 37 F.L.R.A. 515 (1990) (*Portsmouth*), *rev'd sub nom. Department of the Navy, Portsmouth Naval Shipyard, New Hampshire v. FLRA*, 941 F.2d 49 (1st Cir. 1991) (Pet. App. 38a, 53a). In *Portsmouth*, the Authority held that section 7114(b)(4) establishes a broad data disclosure requirement for federal agency employers as part of their bargaining obligation under the Statute. 37 F.L.R.A. at 519. One exception to this requirement, here at issue, is whether disclosure is "prohibited by law." The Privacy Act, 5 U.S.C. 552a (1988), generally bars unconsented disclosure of personal data such as home addresses unless, among other things, release is required under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1988). 5 U.S.C. 552a(b)(2).

Mindful of the fact that the issue of home address disclosure arises under the Labor Statute and thus involves predominantly labor relations concerns, the Authority held in *Portsmouth* that the FOIA exception to the Privacy Act's bar to disclosure applied, and thus home address disclosure to the union under section 7114(b)(4) was not prohibited by law.² 37 F.L.R.A. at 524-25, 537. The

² In *Portsmouth*, the Authority also reaffirmed its earlier decision on this issue, *Farmers Home Administration Finance Office, St. Louis, Missouri*, 23 F.L.R.A. 788 (1986) (*Farmers Home Administration*), *enforced in part and remanded sub nom. United States Department of Agriculture v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989). 37 F.L.R.A. at 525.

Authority noted particularly the congressionally recognized public interest that underlies section 7114(b)(4), namely, that an effective federal sector collective bargaining system promotes the public interest.³ 5 U.S.C. 7101(a). 37 F.L.R.A. at 528. The Authority also detailed a number of specific rights and obligations set out in the Labor Statute, such as the duty of fair representation, which disclosure of information to unions under section 7114(b)(4) would facilitate. 37 F.L.R.A. at 527-28.

The Authority in *Portsmouth* respectfully rejected the D.C. Circuit's holding in *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990) (*Dep't of the Treasury*), that the Privacy Act barred disclosure. 37 F.L.R.A. at 523. In the Authority's view, *Dep't of the Treasury* was premised on a misapplication of this Court's decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) (*Reporters Committee*). 37 F.L.R.A. at 523. The Authority concluded in this connection that *Reporters Committee* should not be applied to disclosure requests arising directly under the Labor Statute, rather than under the FOIA itself. *Id.* The Authority found in *Portsmouth* that direct application of *Reporters Committee* would result in treating federal sector unions like any other member of the public requesting FOIA documents. 37 F.L.R.A. at 526.

2. The Court of Appeal's Decision in the Instant Case

The Fifth Circuit enforced the Authority's name and home address disclosure orders and denied the agencies'

³ The Authority recognized in *Portsmouth*, as it has in other cases under the Labor Statute involving disclosure of personal data, that FOIA Exemption 6 requires balancing the public interest in disclosure against the individual's privacy interest to determine whether the invasion of privacy is "clearly unwarranted." 37 F.L.R.A. at 519.

petitions for review (Pet. App. 1a-34a). Agreeing that employees' names and home addresses are necessary to the full and proper conduct of collective bargaining, the court focused on whether disclosure of those names and home addresses is "prohibited by law" under section 7114(b)(4) of the Labor Statute (Pet. App. 9a-26a).

In resolving whether disclosure was prohibited by law under the Labor Statute, the court examined the Privacy Act and the FOIA (Pet. App. 10a). The court noted that an exception to the Privacy Act's prohibition against disclosure of personal information about federal employees without their consent was the FOIA (Pet. App. 10a-11a). Generally, the court observed, FOIA "embodies 'a general philosophy of full agency disclosure'" (Pet. App. 11a). However, FOIA Exemption 6 protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" (*id.*). 5 U.S.C. 552(b)(6) (FOIA Exemption 6). The court therefore turned its attention to whether the disclosure in this case would constitute a "clearly unwarranted invasion of personal privacy" within the meaning of FOIA Exemption 6 (*id.*).

The court noted that a consensus had existed among the circuit courts of appeals which had addressed this issue, that unions representing federal employees were entitled to obtain the information under the Labor Statute (Pet. App. 11a-12a).⁴ In determining whether disclosure was warranted, these courts weighed the public interest in

⁴ *United States Dep't of Agric. v. FLRA*, 836 F.2d 1139 (8th Cir. 1988), *vacated on other grounds and remanded*, 488 U.S. 1025 (1989); *United States Dep't of the Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d 1131 (3d Cir.), *petition for cert. dismissed*, 488 U.S. 881 (1988); *United States Dep't of the Air Force v. FLRA*, 838 F.2d 229 (7th Cir.), *petition for cert. dismissed*, 488 U.S. 880 (1988); *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d 1129 (4th Cir. 1987), *petition for cert. dismissed*, 488 U.S. 880 (1988); *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d 554 (2d Cir. 1986).

promoting collective bargaining by federal employees against the employees' interest in protecting their names and home addresses from disclosure (Pet. App. 12a). Several courts also took notice of the fact that employers in the private sector are required to disclose the same information to employees' exclusive representatives, and found no apparent reason to treat federal union representatives differently (Pet. App. 13a-14a).⁵

The court below also noted that this Court's decision in *Reporters Committee* resulted in a disappearance of the prior consensus among the circuit courts on the disclosure issue (Pet. App. 15a-16a). In *Reporters Committee*, this Court rejected a disclosure request arising directly under FOIA for an FBI "rap sheet" because disclosure would have constituted an unwarranted invasion of personal privacy under FOIA Exemption 7(C) (5 U.S.C. 552 (b)(7)(C) (Exemption 7(C))). The Court determined that the disclosure interest must be measured in terms of its relation to FOIA's basic purpose to open agency action to the light of public scrutiny (Pet. App. 17a-18a). Following *Reporters Committee*, a split developed among the courts of appeals on whether the disclosure of unit employees' home addresses to their exclusive representatives was required under the Labor Statute (Pet. App. 16a).⁶

⁵ *United States Dep't of the Navy and Philadelphia Naval Shipyard v. FLRA*, 840 F.2d at 1138; *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d at 1132 n.4; *American Fed'n of Gov't Employees, Local 1760 v. FLRA*, 786 F.2d at 557.

⁶ Along with the Fifth Circuit, the following circuit courts of appeals agreed with the Authority that providing employees' home addresses to their exclusive representative under section 7114(b)(4) of the Labor Statute was not prohibited by the Privacy Act. *FLRA v. Department of the Navy, Navy Ships Parts Control Ctr.*, 966 F.2d 747 (3d Cir. 1992) (*en banc*); *FLRA v. Department of the Navy, Navy Resale & Serv. Support Office, Field Support Office, Auburn, Wash.*, 958 F.2d 1490 (9th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* pending); and *FLRA v. Department of Commerce, Nat'l Oceanic and Atmospheric Admin., Nat'l*

The Fifth Circuit found that the courts of appeals which had barred disclosure had "read too much into *Reporters Committee*," and agreed with the circuit courts that held that disclosure was required under the Labor Statute (Pet. App. 18a). The court below gave two reasons. First, the court observed that *Reporters Committee* involved FOIA Exemption 7(C) rather than FOIA Exemption 6. (Pet. App. 19a-20a). In this regard, the court below noted this Court's recognition that Exemption 7(C), which merely requires that an invasion of privacy be "unwarranted," should be applied more broadly than Exemption 6, where the standard is a "clearly unwarranted invasion" of privacy. 489 U.S. at 7.

Second, the court below found "unlike the complainants in *Reporters Committee*, the unions' disclosure requests in this case do not arise under the FOIA" (Pet. App. 20a). Rather, the court indicated, "their requests originate from within the [Labor Statute] and its Congressionally endorsed framework for protecting and promoting collective bargaining" (*id.*). In sum, the court found that *Reporters Committee* "does not require the federal courts, when balancing interests favoring and opposing

Ocean Serv., 954 F.2d 994 (4th Cir. 1992), *vacated and reh'g granted* (Apr. 22, 1992) (pending before the court *en banc*).

Several other circuits have reversed the Authority on the home address disclosure issue. *FLRA v. United States Dep't of Defense, Army and Air Force Exch. Serv., Dallas, Tex.*, Nos. 90-9561 & 90-9569 (10th Cir. Jan. 20, 1993); *FLRA v. U.S. Dep't of Defense*, 977 F.2d 545 (11th Cir. 1992) (petition for rehearing and suggestion for rehearing *en banc* pending); *FLRA v. Department of the Navy, Navy Exch., Naval Training Station, Naval Hosp., Great Lakes, Ill.*, 975 F.2d 348 (7th Cir. 1992); *FLRA v. Department of the Navy, Naval Resale Activity*, 963 F.2d 124 (6th Cir. 1992); *FLRA v. Department of Veterans Affairs Medical Ctr., Newington, Conn.*, 958 F.2d 503 (2d Cir. 1992); *FLRA v. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, N.H.*, 941 F.2d 49 (1st Cir. 1991); *FLRA v. Department of the Treasury, Fin. Management Serv.*, 884 F.2d 1446 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1055 (1990).

disclosure, to ignore public interests other than those embodied in the FOIA when the disclosure request originates from some statute other than the FOIA" (Pet. App. 25a). In such a case, the court below stated, "it is proper . . . to consider the public interest embodied in the statute which generates the disclosure request" (Pet. App. 25a-26a). This approach, the court indicated, "fully accords not only with the [Labor Statute]—with its explicit declaration that it seeks to promote collective bargaining and its direction to unions that they represent nonmember employees as faithfully as they do their members—but also fully accords with Congress' aim in establishing the FOIA—to provide a workable formula 'which encompasses, balances, and protects all interests'" (Pet. App. 26a). Accordingly, the court ruled that the public interest in collective bargaining outweighed the employees' privacy interests in nondisclosure of their names and home addresses (*id.*). The court concluded that disclosure would not constitute a clearly unwarranted invasion of privacy, and was thus not prohibited by the Privacy Act. The court therefore granted the Authority's enforcement applications requiring disclosure of the information (*id.*).

Judge Emilio M. Garza filed a dissent concluding that *Reporters Committee* controlled the disclosure issue (Pet. App. 27a-34a). Although Judge Garza agreed that *Reporters Committee* did not consider the Labor Statute's "explicit policy favoring collective bargaining as in the public interest," he nevertheless found that the language of section 7114(b)(4) and *Reporters Committee* made the policy irrelevant (Pet. App. 32a). Further, while Judge Garza agreed with the majority that *Reporters Committee* dealt with Exemption 7(C), not Exemption 6, he did not view such differences as determinative here (Pet. App. 29a-31a).

THE AUTHORITY DOES NOT OPPOSE THE PETITION

The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the several courts of appeals that have considered the issue of the disclosure of unit employees' home addresses to their exclusive representatives under the Labor Statute reached varying results.

There is a direct conflict in the courts of appeals on the question of whether unions are prohibited by law, under section 7114(b)(4) of the Labor Statute, from gaining access to unit employees' home addresses. The circuit split is detailed in note 6, *supra*.⁷

⁷ When the Third Circuit *en banc* upheld the Authority, it also examined, among other things, whether home address disclosure was authorized as a "routine use" under the Privacy Act, 5 U.S.C. 552a(b)(3) (Exception (b)(3)). That section authorizes disclosure "for a purpose which is compatible with the purposes for which it was collected," 5 U.S.C. 552a(a)(7), and in accordance with a "routine use" regulation, 5 U.S.C. 552a(e)(4)(D). In the Authority decision before the court, the Authority had concluded that the labor union was a routine user under a routine use statement contained in a regulation promulgated by the Office of Personnel Management (OPM), 49 Fed. Reg. 36,949, 36,956 (1984). The Third Circuit upheld the Authority on that alternative basis. In reaching this conclusion, the Third Circuit refused to defer to OPM's interpretation of its regulation, indicating that "until the OPM publishes its interpretation in a manner sufficient to place the public on notice of both the existence and content of that interpretation, [it would] not defer to the . . . interpretation." 966 F.2d at 764. At the time of the court's *en banc* ruling, OPM had in litigation papers construed its routine use regulation not to provide for the release of home addresses in cases, unless the union had no adequate alternative methods of communication with bargaining unit members.

On September 17, 1992, OPM published Federal Personnel Manual (FPM) Letter 711-164, confirming its previous interpretation of the routine use statement providing, among other things, that unit employees' home addresses are not authorized for release to labor unions in situations where the unions have adequate alternative means of communicating with the employees. Accordingly, in light of OPM's publication, the only dispositive determination remaining

Only this Court can authoritatively rectify this circuit split by speaking to the application of its decision in *Reporters Committee* in the context of disclosure requests arising under the Labor Statute, a statute other than FOIA. The resolution of the issue in this case will determine whether the explicit public interest in collective bargaining embodied in the Labor Statute is relevant to determining the public interest in disclosure of information requested by a federal labor union under provisions of the Labor Statute. See pages 13-14 of the agencies' Petition for Writ of Certiorari. The importance of this issue to federal employees and federal sector labor-management relations makes this a strong basis for granting the petition in this case.

Moreover, this type of circuit conflict raises important issues as to whether Congress intended to create a disparity between the means of communication available to private and federal sector unions. Congress modeled the Authority and the Labor Statute on the National Labor Relations Board and the National Labor Relations Act, 29 U.S.C. 151-169. See *BATF*, 464 U.S. at 92-93. See also *United States Dep't of Health and Human Servs. v. FLRA*, 833 F.2d at 1132 n.4 (noting that the NLRA, which governs private sector labor relations, shares similar purposes and concerns with the Labor Statute); *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299-300 (D.C. Cir. 1987) ("Congress was fully aware of the analogy between the [Labor Statute] and the National Labor Relations Act Congress paid

on the disclosure controversy in the Third Circuit *en banc* decision is the court's resolution of whether the Privacy Act authorizes disclosure of home addresses under FOIA. Eleven judges chose to actively participate in resolving that issue, and a majority of those judges voted in the Authority's favor. Judge Roth abstained from voting on this part of the case. Accordingly, despite the agencies' contentions (Pet. 12 note 6), the operative effect of the *en banc* court decision was a "holding" in the Authority's favor on the FOIA release issue. 966 F.2d at 761.

close attention to judicial precedent in private sector labor law when drafting the [Labor Statute]").

Accordingly, the Authority does not oppose granting the present petition.

Respectfully submitted.*

DAVID M. SMITH *
Solicitor

WILLIAM R. TOBEY
Deputy Solicitor

WILLIAM E. PERSINA
Attorney

PAMELA P. JOHNSON
Attorney

Federal Labor Relations Authority
607 14th Street, N.W.
Washington, D.C. 20424-0001
(202) 482-6620

* Counsel of Record

FEBRUARY 1993

* William C. Bryson, Acting Solicitor General, authorizes the filing of this memorandum.